

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WALTER SOLOMON,

Case No. C19-1469RSM

Plaintiff,

**ORDER GRANTING MOTION TO
DISMISS FOR FAILURE TO PROSECUTE**

V.

C R BARD INCORPORATED, BARD
PERIPHERAL VASCULAR
INCORPORATED.

Defendants.

This matter comes before the Court on Defendants' Motion to Dismiss for Failure to Prosecute, Dkt. #30. Plaintiff Walter Solomon has failed to file a timely response to this Motion or otherwise communicate with the Court since it was filed three months ago.

Following remand of this case to the District Court for the Western District of Washington, on February 13, 2020, the Court entered a Minute Order Setting Trial Date and Related Dates. Dkt. #22. This set the discovery cut-off as September 14, 2020.

Defendants have been unable to depose Plaintiff despite months of communications with Plaintiff's former counsel. *See* Dkt. #31-1 at 2. Deposition was actually set for July 22, 2020, and Plaintiff did not show. *See id.* at 15. It appears Plaintiff's former counsel was unable to contact Plaintiff. *See id.* at 14. On July 23, 2020, Plaintiff's counsel withdrew from the case, and the Court issued a Minute Order directing Plaintiff to secure new counsel by September 4 or

1 proceed pro se. *See* Dkts. #28 and #29. Defendants have since served Plaintiff with new
 2 discovery requests which have gone unanswered. *See* Dkt. #31- at 19.

3 Unable to proceed, Defendants filed the instant Motion. On October 13, 2020, the Court
 4 stated in a Minute Order on October 13 the following:

5 Defendants' motion to dismiss, docket no. 30, is RENOTED to
 6 December 11, 2020. Plaintiff is ADVISED that a response to
 7 defendants' motion to dismiss is due by December 7, 2020. In the
 8 absence of a timely response, the Court will conclude that plaintiff
 9 is no longer interested in pursuing this lawsuit and that the case
 should be dismissed.

10 Dkt. #33 at 1. The Court has received no word from Plaintiff.

11 Rule 37 of the Federal Rules of Civil Procedure allows a court to impose sanctions
 12 where a party "fails, after being served with proper notice, to appear for that person's
 13 deposition." Fed. R. Civ. P. 37(d)(1)(A). The available sanctions include "dismissing the action
 14 or proceeding in whole or in part." Fed. R. Civ. P. 37(b)(2)(A)(v), (d)(3).

16 Rule 41(b) of the Federal Rules of Civil Procedure also allows for dismissal, providing
 17 that a defendant may move to dismiss an action where a plaintiff fails to prosecute his or her
 18 case or where a plaintiff fails to comply with a court order. *See* Fed. R. Civ. P. 41(b).

19 Dismissal is a harsh penalty, imposed only in extreme circumstances. *Malone v. United*
20 States Postal Service, 833 F.2d 128, 130 (9th Cir. 1987). Where a court considers dismissal as a
 21 remedy for failure to prosecute, the court is to consider: "(1) the public's interest in expeditious
 22 resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the
 23 defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the
 24 availability of less drastic sanctions." *Thompson v. Hous. Auth. of City of Los Angeles*, 782
 25 F.2d 829, 831 (9th Cir. 1986).

1 Defendants argue that Plaintiff's continued unavailability impairs their ability to
2 construct their defense, that "less drastic sanctions, while available, are not appropriate in light
3 of the unanswered Requests and Plaintiff's continued silence," and that "the above deficiencies
4 are sufficient grounds for dismissal of this action." Dkt. #31 at 5 (citing, *inter alia*, *Sigliano v.*
5 *Mendoza*, 642 F.2d 309, 310 (9th Cir. 1981)).
6

7 The Court agrees. Plaintiff's deposition was critical to this medical device product
8 liability action where he alleges physical injury. Plaintiff's failure to respond to discovery
9 requests has clearly prejudiced Defendants. Most importantly, Plaintiff's failure to
10 communicate with his former counsel, and subsequent failure to respond to this Motion or to
11 communicate with the Court has led to the conclusion that he is no longer interested in pursuing
12 this lawsuit. This case cannot be resolved without the participation of Plaintiff, and the Court is
13 convinced that no lesser sanction would be appropriate.
14

15 Having considered the applicable briefing submitted by the parties and the entire record,
16 the Court hereby finds and ORDERS that Defendants' Motion to Dismiss for Failure to
17 Prosecute, Dkt. #30, is GRANTED. This case is DISMISSED. Defendants may, if they
18 choose, file a separate motion for attorney's fees setting forth the legal basis for such fees, and
19 are to include a declaration with factual support for the hourly rate and number of hours
20 requested. Such Motion may be filed no later than **30 days** from the date of this Order.
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22 DATED this 16th day of December, 2020.
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RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE